

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 4, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 JUN -4 PM 3:52
CHIEF CLERKS OFFICE

RE: HUDSON HARBOR, LTD.
TCEQ DOCKET NO. 2006-0200-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2006-0200-MWD

**IN THE MATTER OF
THE APPLICATION OF
HUDSON HARBOR, LTD
FOR RENEWAL OF
PERMIT NO.
WQ0014227001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2006 JUN -4 PM 3:52
CLERK'S OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING
REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this
Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Hudson Harbor, Ltd. (Applicant) has applied to TCEQ for a renewal of TPDES
Permit No. WQ0014227001, which currently authorizes discharge of treated domestic
wastewater at a daily average flow not to exceed 14,000 gallons per day via subsurface
drip irrigation of 3.2 acres of public access land. Application rates are not to exceed .1
gallons per square foot per day. Construction on the wastewater treatment facility
(facility) has not begun, although the initial permit was issued on May 15, 2001. The
proposed facility's treatment units would consist of a septic tank system and subsurface
drip irrigation system.¹ The proposed facility and disposal site are located on Hudson

¹ Specifically, the current permit authorizes a facility which includes a primary settling tank, re-circulating
and equalization dosing tank, re-circulating media filter, drip irrigation dosing tank and a subsurface drip
irrigation system.

Shore of Lake Travis, approximately 5 miles northwest of the intersection of 2222 and 620 in Travis County, Texas.

The current permit was issued May 15, 2001 and the renewal application was received on October 29, 2004 and was declared administratively complete on April 27, 2005. The initial permit was issued to LTLP, Ltd and was subsequently transferred to the current applicant during this renewal process. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Renewal (NORI) was published in the *Austin American Statesman* on June 2, 2005. The Executive Director completed the technical review of the application and prepared a draft permit, which was mailed by the Chief Clerk's Office on June 30, 2005. The Notice of Application and Preliminary Decision (NAPD) was published in the *Austin American Statesman* on November 2, 2005.

The comment period ended on December 2, 2005. The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on January 23, 2006. The TCEQ received one hearing request filed by Deborah Gernes, on behalf of Travis County Water Control and Improvement District 17 (the District) on February 21, 2006. This hearing request was originally scheduled for Commission consideration on May 31, 2006 but was remanded to the Executive Director on May 4, 2006.

II. REQUIREMENTS OF APPLICABLE LAW

No right to a hearing exists on a renewal or amendment application under Chapter 26 of the Texas Water Code if:

- (1) the applicant is not applying to:
 - (A) increase significantly the quantity of waste authorized to be discharged; or
 - (B) change materially the pattern or place of discharge;

- (2) the activities to be authorized by the renewed or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (3) any required notice and opportunity for a public meeting has been given;
- (4) consideration and response to all timely received and significant public comment has been given; and
- (5) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.¹

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

¹ TEX. WATER CODE § 26.028(d); 30 TAC § 55.201(i)(5).

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. Although No Entitlement to a Hearing Exists on this Renewal Application, the Commission Should Grant the District's Hearing Request under TEXAS WATER CODE §26.0282

As an initial matter, the Commission must determine whether the District is entitled to a contested case hearing as a matter of law. Upon reviewing the criteria set forth above and in TEXAS WATER CODE (TWC) §26.028(d), OPIC concludes that the Commission may issue this permit without holding a public hearing. According to the information reviewed by the OPIC, the District's renewal application satisfies each of the requirements of §26.028(d). The application seeks to renew a permit governed by Chapter 26 of the Water Code. This application does not propose to increase the amount of effluent authorized to be discharged, nor does it change the pattern or place of discharge. The renewal contains the same effluent limitations as the original permit, thereby maintaining the quality of waste authorized to be discharged. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit informed the public of the right to request a public meeting on this application. The Executive Director's Response to Public Comment was filed with the Chief Clerk's Office and mailed to all commenters. In addition, since there is no facility and Applicant is a new TCEQ customer, no compliance history exists.

Nevertheless, OPIC recommends the Commission grant the District's hearing request. The District raises the issues of need for the facility and regionalization and the Commission has the obligation to "implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state."² More specifically, the Commission "may deny or alter the terms and conditions of the proposed permit, amendment, *or renewal* based on consideration of need, including the expected

² TEX. WATER CODE ("TWC") § 26.081 (a)

volume and quality of the influent and the availability of existing or proposed area-wide or regional waste collection, treatment, and disposal systems not designated as such by commission order.”³ Significantly, the Commission’s statutory authority to deny or alter a permit renewal based on issues of need is unrestricted with respect to all renewals—whether or not permit provisions remain unchanged.

Although no right to a hearing exists as described in TWC §26.028(d), the Commission is not prohibited from referring a wastewater renewal application to SOAH, and may rely on its express statutory authority to consider regionalization issues in the specific context of renewal applications.⁴

B. Determination of Affected Person Status

OPIC recommends finding the District to be an “affected person” because the hearing request demonstrates a personal justiciable interest related to a legal right affected by the application. According to the hearing request, the District is the holder of the certificate of convenience and necessity (CCN) which incorporates the land owned by Applicant (and which Applicant intends to serve). The District further states that renewal of the permit would be “detrimental to the District’s plans to provide centralized service from an established retail utility.”⁵ In addition, OPIC finds that the District has a personal justiciable interest because, as the holder of the CCN, the District must provide service to Applicant if requested and is charged with planning CCN-wide treatment options.

³ TWC § 26.0282

⁴ *Id.*

⁵ See Travis County Water Control and Improvement District 17 (the District) hearing request dated February 21, 2006.

As described above, OPIC finds that the interests related to regionalization raised by the District are protected by the law under which the application will be considered.⁶

C. Issue Raised in the Hearing Requests

The District discusses its opposition to renewal of Applicant's permit because development of the facility would be detrimental to the District's plans for a centralized service. More broadly, the District asserts that renewal would be contrary to the State's goals of regionalization and result in eventual detriment to public service and the environment.

D. Issues raised in Comment Period

The issue raised in the hearing request was also raised in the comment period⁷ and has not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the District and the applicant or Executive Director on the issue raised in the hearing request.⁸

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. See 30 TAC §55.211(b)(3)(A) and (B). OPIC finds whether there is a need

⁶ See Interim Order concerning an application by 14875 Partners, Ltd; TCEQ Docket No. 2005-1519-MWD, December 13, 2005. Here, the Commission referred an issue of regionalization to SOAH for a contested case hearing (Whether existing or *proposed* areawide or regional waste collection, treatment, or disposal systems can satisfy the need for the proposed new wastewater treatment plant); See also Interim Order concerning application by UA Holdings; TCEQ Docket No. 2005-1184-MWD, October 17, 2005. Here the Commission referred the general issue of regionalization to SOAH. (Whether issuing the permit is consistent with the Commission's regionalization policy.)

⁷ See Comments submitted by the District on May 25, 2005.

⁸ See the District's hearing request, February 21, 2006.

for the facility under the factors set forth in TWC §26.0282 is an issue of fact appropriate for referral.

G. Relevant and Material Issues

The hearing request raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.⁹ Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.¹⁰ An issue concerning the need for the facility and the permitted activity's consistency with the Commission's regionalization policy is relevant and material to the Commission's decision.

H. Issue Recommended for Referral

OPIC recommends that the following disputed issue of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

Is there a need for the facility such that renewal of Applicant's permit is consistent with the Commission's regionalization policy?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the

⁹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

¹⁰ *Id.*

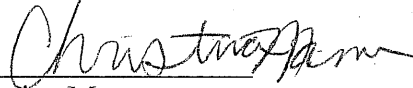
first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issue recommended above. OPIC further recommends a hearing duration of six months.

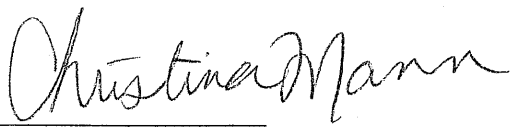
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Christina Mann
Assistant Public Interest Counsel
State Bar No. 24041388
(512)239.6363 PHONE
(512)239.6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2007 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Christina Mann

MAILING LIST
HUDSON HARBOR, LTD.
TCEQ DOCKET NO. 2006-0200-MWD

FOR THE APPLICANT:

Steven Morse, Vice President
Hudson Harbor, Ltd.
6400 Hudson Bend Road
Austin, Texas 78734-1336

Andrew Rooke, P.E.
Turner Collie & Braden, Inc.
400 West 15th Street, Ste. 500
Austin, Texas 78701-1600
Tel: (512) 472-4519
Fax: (512) 472-7519

Terrence C. Irion, Attorney
Irion Slade
2224 Walsh Tarlton, Ste. 210
Austin, Texas 78746
Tel: (512) 347-9977
Fax: (512) 347-7085

FOR THE EXECUTIVE DIRECTOR:

Scott Shoemaker, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Firoj Vahora, Team Leader
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-5132
Fax: (512) 239-4114

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER:

Deborah S. Gernes, General Manager
Travis County WCID No. 17
3812 Eck Lane
Austin, Texas 78734-1613

